In the Supreme Court
OF THE
United States

Office - Supreme Court, U.S.
FILED
JAN 13 1953
HAROLD B. WILLEY, Clerk

OCTOBER TERM, 1953

No. 545

MATTIE J. LEWIS, et al.,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

RICHMOND INVESTMENT CO., et al.,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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PARKER-WALKER PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Mattie I. Lewis, et al. and Richmond Investment Company, et al., respectfully pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 13, 1952, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

JURISDICTION.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. Sec. 1254(1) and 2101, and the provisions of Sec. 240(a) of the Judicial Code, as amended.[1]

The judgment of the United States Court of Appeals for the Ninth Circuit was entered November 13, 1952.

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[1]The Circuit Court of Appeals Act of 1891 (March 3, 1891, chap. 517, Sec. 6, 26 Stat. at L. 826, 828, U.S.C. Title 28, Sec. 347), provided that in any case in which the judgment of the Circuit Court of Appeals is made final, "it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." *Gay v. Ruff* (April 2, 1934), 292 U.S. 25, 78 L. ed. Adv. 729, 92 ALR 970, 54 S. Ct. 608.

OPINION BELOW.

The opinion of the District Court is printed in the record herein. (R. 108.)

The opinion of the Court of Appeals appears in ..... F. (2d) ....., and is also printed in the record (R. 108), and in the appendix hereto.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are contained in the Lanham Act (the Act of October 14, 1940, Public No. 849, 76th Congress; 54 Stat. 1125, 42 U.S.C.A. Secs. 1521, et seq.), as follows:

> "Sec. 1521 (title 42) Federal Works Administrator's Powers Respecting Defense Housing.
>
> "In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the 'Administrator') is authorized:
>
> (a) To acquire prior to the approval of title by the Attorney General (without regard to section 1339 of Title 10 and section 5 of Title 41), improved or unimproved lands or interests in lands by purchase, donation, exchange, lease (without regard to sections 40a and 34 of Title

40, or any time limit on the availability of funds for the payment of rent), or condemnation (including proceedings under sections 257, 258, 361-368, and 248a-258e of Title 40).

STATEMENT OF THE CASE.

These proceedings are in eminent domain and were originally filed in the United States District Court, Northern District of California, Southern Division, at the instance of the Federal Public Housing Authority, herein sometimes referred to as the Housing Agency or Housing Administrator, condemning parcels of land of numerous private owners in the city of Richmond, California, being Civil Actions No. 22335-L, filed October 16, 1942, and No. 22338-R, filed October 19, 1942. The two actions were duly consolidated for trial in the United States District Court, and were subsequently consolidated for the purpose of appeal in the United States Court of Appeals for the Ninth Circuit. Judgments in the United States District Court were entered in both consolidated actions August 8, 1951, and on appeal in the United States Court of Appeals November 13, 1952.

(a) Basic issue.

The basic issue presented by this petition is *whether the said Lanham Act authorizes or does not authorize the Housing Agency to take by condemnation, the fee simple title instead of a temporary use*

and occupancy or leasehold of privately owned property for merely a temporary housing use and purpose.

In other words,

Whether the Housing Administrator, having elected not to acquire by the voluntary process of purchase, but to take private property *by force of condemnation,* admittedly and undisputably for only temporary housing of temporary construction for the temporary wartime use designated by Congress in said Lanham Act, has power to take a greater quantum of interest in lands than neccessary for such *temporary* use?

(b) Other issues.

Other issues involve the Housing Agency's stated intention to use the funds deposited in Court to compensate for an excess quantum of interest in private lands taken by condemnation beyond the needs of the temporary use intended, and the further question of pleadings wherein the condemnor failed to allege or prove compliance with the express requirements stated by Congress in the Lanham Act, as conditions precedent to any acquisition either by purchase or by condemnation.

(c) Admitted and uncontroverted facts.

Declarations of Taking were filed in condemnation October 15, 1942. Complaints in the two condemnation actions herein were filed October 16 and 19, 1942, respectively. The petitioners herein, about 75 in number, were then the owners of parcels of land in the

"Canal Subdivision" adjacent to the wartime emergency shipyards at Richmond, California.

The President of the United States had declared a National War Emergency on September 8, 1939, and in October, 1940 Congress passed the said Lanham Act for the purpose of providing temporary wartime housing, subject to expressed restrictions imposed by Congress in the Act. Two facts are significant in this case: 1. That the Lanham Act did not expressly authorize the Housing Agency to condemn the *fee simple title* for such limited type of housing, and 2. That Congress in said Act did not expressly grant *discretionary* power to the Housing Administrator to take by *condemnation* whatever quantum of lands he might choose beyond the necessities of the specified use. What the Agency *could* have done, if it had elected to acquire by voluntary "purchase, donation, exchange or lease", is not an issue in this case.

In the said Lanham Act, Congress designated only one public use or purpose, that of wartime housing for war workers in wartime industries, limited to specifically described localities conditioned upon the existence of certain specifications and conditions precedent, including compliance therewith required to be so declared expressly by the President. Further comment will be hereinafter directed to the failure of the condemning agency to allege or prove compliance with these specified conditions precedent.

The said Act provided for the termination of this authorization for housing when the declared emergency ended. The National War Emergency was terminated on July 25, 1947.

Also establishing the fact that, when these actions were filed, the Housing Agency *elected temporary* housing as the particular public use for which it was taking the private property. The Agency admittedly constructed merely temporary frame buildings. This is an uncontroverted fact. In these proceedings the Agency has never contended that it condemned for any use other than *temporary* housing. In the Order of the trial Court (R. 47) denying defendants' motion for judgment in the course of the trial, the trial Court said (R. 48): "Evidence introduced during the trial indicated that the housing units erected upon the property in question were of a type denominated as temporary." Also (R. 49): "And though the housing which he did erect was of a temporary character it was an improvement to the realty and became a part thereof." (See testimony of witness for condemnor, R. 80.)

The trial Court denied certain motions (R. 42) filed by the defendant property owners, ruling (R. 47) that:

> "Counsel for the defendants contend in their briefs earnestly and with much persuasiveness that a taking in eminent domain proceedings can be supported only for the amount of and interest in the land taken that is absolutely essential for

> the public need and that it is a judicial function to determine if the taking satisfies these requirements. The cases cited state the rule as contended, followed in most jurisdictions. There is much merit therein, but I am convinced that they do not express the rule with respect to condemnation by the federal government." (R. 49.)

Is it to be presumed that the decision of the Court of Appeals herein affirms such ruling of the trial Court? The soundness of such statement of a purported fundamental rule in eminent domain, is questioned in petitioners' brief herein.

In the course of the trial in the United States District Court, the defendant property owners filed a motion for judgment (R. bottom of 63) on the grounds that the quantum of interest in lands (the fee simple title) condemned herein is excessive for the intended use of temporary housing as authorized by the Lanham Act, and on the ground that no evidence was offered at the trial upon which the condemning agency might rely to support its attempted taking of such excess. The motion was denied.

Judgments herein were entered in the United States District Court on October 8, 1951.

The Statement of Points (R. 85) filed by the landowners on appeal to the United States Court of Appeals is presented in the appendix hereto.

A stipulation for consolidation of records on appeal was duly approved in the United States Court

of Appeals for the Ninth Circuit, December 24, 1951. (R. 88.)

The Opinion (R. 108) and Judgment (R. 115) of the United States Court of Appeals were filed and entered November 13, 1952. (Included in the appendix hereto.)

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the Ninth Circuit erred:

1. In failing to distinguish between two different procedures in the acquisition by a government agency of privately owned lands:

   (a) by *voluntary* civil process of purchase, donation, exchange or lease, or

   (b) by forceful taking of lands of private owners through the exercise of extraordinary powers of the government in eminent domain.

2. In failing to hold that when the Housing Agency elected to acquire lands *by condemnation,* instead of by purchase, and elected to condemn for *temporary* housing and not for permanent structures of any kind, such election of procedure and specific public use limited the taking to such quantum of interest from private landowners as would be necessary for a *temporary use,* under the established rules in eminent domain.

3. In failing to protect the defendant landowners in their rights to notice, and proper allegations and proof of full compliance with all conditions precedent to any taking of their lands, as specified by Congress in the Lanham Act.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals for the Ninth Circuit is in conflict with the United States Constition (Fifth and Fourteenth Amendments), as well as statutory law, and fundamental rules in eminent domain to such extent as to call for an exercise of this Court's power of supervision.

In order to illustrate the basic point of excess taking, as presented by the petitioners herein, may it be suggested that if the Housing Agency had elected to condemn for temporary housing in transient auto trailer camps (as was done in many instances under the Lanham Act), or even in tents, as might have been adequate in some localities, it seems obvious that the Agency would not have had power to take an excessive fee simple title for such temporary use. No matter how well intentioned, the Agency obviously had no power to create in that matter a surplus land stockpile for some future public use or general social welfare project.

In eminent domain, are we to accept and establish a rule that would support the taking of permanent fee title where the public use is temporary, whether

for temporarily constructed wood housing, or auto trailers, or tents? It is significant that Congress withheld the delegation of such unlimited authority to take such excess quantum of interests in lands. It seems important to keep in mind that whether the agency could have elected to acquire the lands for some other use, such as for administrative government office structures or the like, is beside the point in these proceedings. When these actions were filed, the Agency actually elected *temporary* housing as the public use intended, for temporary war workers, within the narrow category stated in the Lanham Act.

(A) ERRONEOUS CONCLUSIONS BY COURT OF APPEALS.

(1) Your petitioners herein respectfully refer to the opinion of the Court of Appeals and certain statements and conclusions therein which seem to be clearly erroneous in law and fact, and not applicable to the issues in these proceedings. The Court of Appeals ruled:

> "No distinction is made in the Act between what may be purchased and what may be condemned. And it now is well established that the government's power to condemn is coextensive with its power to purchase." (R. 110.)

This ruling seems to ignore all of the safeguards placed around the private ownership of property by the established rules in eminent domain.

While we are examining merely a limited delegation of power to a Government Agency under a particular Act of Congress in these proceedings, the ruling of the Court of Appeals regarding the scope of the Government's broad power in eminent domain, instead of the scope of the Agency's authorization, would seem to be erroneously applied.

Although the Act does not distinguish between what may be purchased and what may be condemned, nevertheless the Act does describe and specify the public use of temporary wartime housing limited to certain war workers. The Court of Appeals ignores the omission by Congress to provide in the Act a delegation of any power of discretion to the Agency to take whatever quantum the Agency might choose to take, even to the extent of an excess quantum beyond the needs of the housing use described in the Act. For this reason the two authorities cited and relied upon do not apply.

That the power to condemn is not coextensive with the power to purchase will be further discussed hereinbelow.

(2) The next conclusion and ruling of the Court of Appeals seems equally erroneous and also *non sequitur:*

> "Thus, if the Administrator might purchase the fee simple title in property for use under the provisions of the Lanham Act, he may also acquire the fee simple title by Condemnation proceedings." (R. 110.)

We submit that there is no rule in eminent domain supporting such conclusion, and that such ruling is in direct conflict with the fundamental principles and established rules in eminent domain. The fact that the Housing Administrator elected to acquire by condemnation brings him into special restrictive rules in eminent domain.

To hold that Congress intended to delegate to an Agency in the Lanham Act the power to condemn free from the protection afforded private property owners in eminent domain, would create an irreconcilable conflict with applicable decisions of this Court.

(3) The Court of Appeals next pointed out that "The Lanham Act does not limit the quantum of interest in property which may be taken for public use", and that "subsection (b) declares that he may build permanent or temporary housing units on the lands or interests in lands acquired".

Without admitting that the Act authorizes that the Agency "may" build permanent *housing* units, it seems obvious that in these particular condemnations, the Agency in fact elected to build temporary housing units. Whether the Agency "may" have built government administrative offices for example, of permanent construction on property acquired by voluntary purchase, or "may" *have done* something else in connection with the temporary *housing* under the Lanham Act is not an issue in this case. The issue in the present case involves an election to erect temporary housing units and a taking in eminent domain (not a

purchase), for a limited temporary housing. It seems clear that the reasoning of the Court of Appeals overlooks this basic point.

It seems clearly erroneous for the Court of Appeals to rely upon a contention in effect that when Congress omits to state specifically and expressly the ordinary and fundamental restrictions in eminent domain, Congress thereby intends a waiver thereof. This erroneous conclusion will be further discussed hereinbelow.

(4) However such was the effect of the ruling of the Court of Appeals herein as follows:

> "The Administrator was thus given discretion to acquire either the entire fee, or a lessor interest in the land." (R. 111-112.)

The condemnor in these actions has been repeatedly challenged to point out the delegation of such discretionary power by Congress to the Housing Administrator acting under the Lanham Act, but in vain. Is such a conclusion by the Court of Appeals to become an established rule in condemnations, reversing the fundamental principles of eminent domain? We find no support for the ruling that an omission of an express delegation of discretionary power in the Act constitutes a grant of such power. Can Congress be presumed to delegate a wide open, uncontrolled and unrestricted *discretion* to the Agency to take excessively, for example, one thousond acres from private owners of property, where one acre was all that was required for the use desig-

nated, or as in the present case, the permanent fee simple title for the Agency's elected use of temporarily constructed housing for temporary war-workers? It seems obvious that such is not the rule and should not be the rule by accepting such a conclusion of the Court of Appeals herein.

(5) We find no provision in the Lanham Act, or in the alleged issues presented by the pleadings in these condemnation proceedings, or in the evidence offered at the trial, to support the following conclusion of the Court of Appeals:

> "Congress, by the Lanham Act, has empowered the Administrator at his discretion to acquire the land needed for defense housing by condemnation. *And to take the interest which in his opinion will be most advantageous to the government.*" (Our emphasis.)

We can only submit that there was no such power granted by Congress in the Lanham Act. If we give weight to the authorities herein cited, a grant or delegation of such discretionary power cannot be implied or read into the Lanham Act. When it is not expressly stated therein it does not exist. The Court of Appeals cites two cases: *United States v. Meyer,* 7 Cir., 1940, 113 F. (2d) 387, 392, and *Simmonds v. United States,* 9 Cir., 1952, ... F. (2d) .....

In both of those cases *discretionary* power had been *expressly* delegated by Congress as to the quantum of interest in lands to be taken by condemnation. By reason of such express delegation of *discretionary*

power in those cases, the taking was held "not subject to judicial review, unless there are abuses of administrative discretion phrased in terms of action in "bad faith" or "capriciously" or "Arbitrarily". However the Lanham Act contains no such express delegation of *discretionary* power to the Housing Agency, and it would seem that such construction of the Lanham Act would tend to establish an unsound rule in construing statutory provisions, in conflict with established rules of construction.

The Court of Appeals further erred by assuming or inferring such power in holding:

> "There is no claim of bad faith in this case, and we cannot say that the evidence required a finding that the authorized officer abused his discretion in determining the amount and interest in land he decided to condemn. Therefore, his decision was final."

It seems timely that the distinction between cases involving a delegation of *discretionary* power, by Congress in condemnation and cases where Congress has withheld any grant of *discretionary* power should be recognized.

(B) APPLICABLE RULES IN EMINENT DOMAIN WITH WHICH RULINGS OF COURT OF APPEALS HEREIN CONFLICT.

(a) Condemnation acts such as the Lanham Act are strictly construed. It seems clear that each authorization of Congress for taking by condemnation contains a positive limitation in eminent domain to

the quantum of interest actually necessary for the specific use authorized and intended by the condemnor and is to be strictly construed.

> "The interest taken by an exercise of the power of eminent domain always depends on the construction of the statute, authorizing the taking, and is limited to the *express terms or clear implication of the statute in which the grant is contained.*" (Our emphasis.)
>
> *Puerto Rico Ry. Light & Power Co. v. U. S.* (1st Circuit), 131 Fed. (2d) 491;
>
> *U. S. v. Parcel of Land (Square South, I.C.)*, 100 F. Supp. 498 at 504, U.S. Court, Dist. of Col.

> "The laws authorizing exercise of the sovereign power of eminent domain are to be strictly followed."
>
> *U. S. v. 2.4 Acres of Land,* 138 Fed. (2d) 295 (7th Circuit).

> "The authority to condemn will be strictly construed in favor of the owner of the property taken and against the condemnor, and the authority must be strictly pursued."
>
> *Warm Springs Irrig. Dist. v. Pac. Live Stock Co.* (1921, C.C.A. 9th), 270 Fed. 560.

For example, a power transmission line over land requires only an easement for which the fee title could not be condemned, as that would be an excessive taking. (Authorities collected in 90 A.L.R. 1020; 14 A.L.R. 1350; 18 Am. Jur., "Eminent Domain", 34, 109, 110, 115; 20 C.J. 1222.)

(b) The quantum of interest in lands to be condemned is limited to the specific public purpose stated in the particular Act of Congress.

Under the Lanham Act where the Agency claims the power to take the fee simple title instead of leasehold for a designated temporary public use or if a clear discretionary power is not expressly provided but is merely implied and assumed by the Agency, *the power does not exist.*

The very existence of such an issue of excessive taking in these proceedings, seems to present sufficient doubt concerning the delegation of any such power as to support a holding in favor of the private land owners against any implied discretionary power.

> "The exercise of the power of eminent domain being against common right, cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out of argument and inference, it does not exist."
>
> *Lewis on Eminent Domain,* Vol. 1, Sec. 371.

> "When an easement will be sufficient, no intendment or rule of liberal construction will be indulged to support an attempt to obtain any greater interest or estate."
>
> *Shoemaker v. U. S.,* 147 U.S. 282;
>
> *Cincinnati v. Vester,* 33 F. (2d) 242;
>
> 1 *Nichols on Eminent Domain,* Sec. 150;
>
> *Cooley's Constitutional Limitations* (8th Ed.), Vol. 2, p. 1193.

It seems to follow, that any doubt concerning the quantum of interest in lands which Congress authorized the Housing Administrator to take by the alternative procedure of condemnation under the Lanham Act is property resolved in favor of the private land owner. (Further discussion and authorities in 18 Amer. Jur. 741, Eminent Domain, Sec. 115 and Sec. 26; Ann. Cas. 1918 A, page 807; 10 Ruling Case Law, 88.)

(C) TEMPORARY QUANTUM FOR A TEMPORARY USE.

The Court of Appeals (9th Circuit) in this proceeding is reversing its own previous ruling as stated in *Warm Springs Irr. Dist. v. Pacific L. S. Co.* (9th Circuit), 270 Fed. 560 (for a reservoir site), that where the interest to be taken by condemnation is not expressly stated in the statute, the condemnor is presumed to take no greater interest than an easement, if an easement is sufficient to satisfy the purpose of the taking. (*Nichols on Eminent Domain,* Sec. 150.)

(D) BURDEN IS ON CONDEMNOR TO ALLEGE AFFIRMATIVELY AND TO PROVE FEE TITLE AS NECESSARY QUANTUM FOR USE SPECIFIED IN ACT.

Failure or omission of the condemning agency of the Government to allege and prove affirmatively that fee title is the necessary quantum for the temporary use authorized, is an admission that no necessity exists beyond an easement for the temporary

housing intended. The position of the Government or Agency as a litigant seeking to establish its statutory rights in condemnation proceedings is exactly the same as that of any other litigant. Again, it is respectfully urged that the Court of Appeals (9th Circuit), by its decision and rulings in these proceedings, erroneously reverses its position stated in the case of:

E. C. Shevlin Co. v. U. S. (9th Circuit), 146 Fed. (2d) 613 at 615.

The failure of such proof was held to be fatal to the taking of private property in the case of *Puerto Rico Ry. L. & P. Co. v. United States* (1st Circuit), 131 Fed. (2d) 491 at 500. That case seems to emphasize the strict construction placed upon any Congressional authorization in eminent domain, and the established policy is to give the benefit of any doubt in every case of condemnation, to favor the private property owner against any invasion of private property rights where Congress delegates the power of eminent domain to an agency.

(E) WHEN THE FEDERAL ACT IS SILENT AS TO THE QUANTUM AUTHORIZED FOR CONDEMNATION THE STATE STATUTE IS FOLLOWED, SUBJECT OF COURSE TO THE FUNDAMENTAL PRINCIPLES IN EMINENT DOMAIN.

Since the Lanham Act omits to define the quantum of interest in lands that the agency may take by condemnation and does not delegate discretionary power

to the agency to take whatever quantum it might desire to take, then the California laws would control.

Under California statutes the purpose or use of "temporary housing" for war-workers during a national emergency, would be classified as a public purpose for which an easement (not a fee title) would be proper. (Calif. Code of Civil Procedure, Sec. 1239.)

It seems significant that the California statutes covering the exercise of the right of eminent domain clearly and expressly state when the fee title may be condemned, and when easements are proper.

> C.C.P. 1239. Estates in Land Subject to Condemnation: "The following is a classification of the estates and rights in lands subject to be taken for public use:
>
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs, etc.
> 2. An easement, when taken for any other use; * * *"
>
> "It has been held that laws authorizing the exercise of the sovereign power of eminent domain are to be strictly followed, Delaware L. & W. R. Co. v. Morristown, 276 U.S. 182, 48 S. Ct. 276, 72 L. Ed. 523, 56 A.L.R. 756; City of Cincinnati v. Vester, 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950, and that the practice and procedure in condemnation proceedings in Federal Courts must be according to the forms and methods of procedure afforded by the law of the State in which

the court sits. United States v. Miller, 317 U.S. 369, 380."

U. S. v. 2.4 Acres, etc., 138 Fed. (2d) 295 (Ill.), (7th Circuit), Oct. 26, 1943.

(F) TO CONDEMN AN EXCESS QUANTUM OF INTEREST IN LANDS IS TO TAKE FOR OTHER THAN PUBLIC USE.

The weight of authorities reviewed in 79 A.L.R. 515-516, support the rules discussed hereinabove in eminent domain:

"'Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires; and that rule applies both to the amount of property and the estate or interest in such property to be acquired by the public.

"'If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public which should not be required to pay for more than it needs.

"'Furthermore, it is universally recognized that a grant of the power of eminent domain will not be extended by implication, and that, when an easement will satisfy the purpose of the grant, the power to condemn the fee will not be included in the grant unless it is so expressly provided.

"'Accordingly, it is well settled that when land is taken for the public use, unless the fee

is necessary for the purposes for which the land is taken, as, for example, when land is taken for a schoolhouse, or the statute expressly provides that the fee shall be taken, the public acquires only an easement.' "

(G) PUBLIC FUNDS ON DEPOSIT HEREIN CANNOT BE USED FOR AN EXCESS TAKING IN EMINENT DOMAIN.

The money deposited in Court to compensate the defendants under the Lanham Act can be applied and disbursed only to compensate for the temporary use authorized by the Act, and cannot be used for any further or other purpose, such as payment for an excess quantum of interest in lands not expressly authorized by Congress in the Act.

The Lanham Act provides as follows:

"Sec. 5. Where any Federal agency has funds for the provision of housing in connection with national-defense activities it may, in its discretion, make transfers of those funds, in whole or in part, to the Administrator, and the funds so transferred shall be available for, but only for, any or all of the objects and purposes of and in accordance with all the authority and limitations contained in this Act, and for administrative expenses in connection therewith."

(H) QUESTIONS INVOLVING THE NATURE AND EXTENT OF THE USE AND QUANTUM OF INTERESTS IN LANDS FOR WHICH CONDEMNATION IS AUTHORIZED ARE JUDICIAL QUESTIONS.

We believe that the opinion in *U. S. Tenn. Valley Authority v. Welch,* 327 U.S. 546, states the rule applicable in the present instance as follows:

> "It is well settled, of course, that, ordinarily, the necessity of taking for public use is a legislative and not a judicial question, and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts. It is equally well settled, however, that 'the nature of the use, whether public or private, is ultimately a judicial question.'
>
> Consequently, where property is taken in excess of that required for the authorized public use, the excess to be used for some other purpose, the courts have power so to declare." (Citations.)

If a Government Agency abuses its power or even inadvertently makes mistakes in the exercise of a power beyond its authorization, such acts of the agency are void and should be so declared and discontinued by a judicial determination.

Cincinnati v. Vester (C.C.A. 6th), 33 Fed. (2d) 242, 68 A.L.R. 831, affirmed in 281 U.S. 439;

Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659, 666, 14 A.L.R. 1350;

Rindge Co. v. Los Angeles County, 262 U.S. 700;

Sears v. Akron, 246 U.S. 242;

Hairston v. Danville & W. R. Co., 208 U.S. 598;

U. S. v. Gettysburg Elec. R. Co., 160 U.S. 668.

The Tenn. Valley Authority Act granted *discretionary* power to the Authority to condemn any interest in property that the Authority "deems necessary for carrying out the purposes of this Act". Congress did not delegate any such broad discretion to the Housing Agency in the Lanham Act, and this omission has apparently been overlooked by the Court of Appeals herein.

Mr. Justice Reed's concurring opinion in *U. S. Tenn. Valley Authority v. Welch,* 327 U.S. 546, supports the rule as follows:

> "It is my opinion that the TVA is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially, by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress." (*Amer. School of M. Healing v. McAnnulty,* 187 U.S. 94.)

Justice Reed further ruled:

> "This taking is for a public purpose, but whether it is or is not is a judicial question. Of course, the legislative determination has great weight but the constitutional doctrine of Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizens. The former cases go no further than

this." (Citing: *U. S. v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680; *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 709; *Old Dominion Land Co. v. U. S.*, 269 U.S. 55, 66; *Cincinnati v. Vester*, 281 U.S. 439, 446.)

"Consequently, where property is taken in excess of that required for the authorized public use, the excess to be used for some other purpose, the courts have power so to declare."

"The taking of such excess land is not for a public use. Whether the particular use authorized is public is always a question for the judiciary."

"It is said that, in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be resolved adversely to the right; that the affirmative must be shown, as silence is negation; and that unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised. Fertilizing Co. v. Hyde Park, 97 U.S. 659, 666, 24 L. Ed. 1036."

(I) NON-EXISTENCE OF EXPRESS DELEGATION OF DISCRETIONARY POWER CLASSIFIES CASES APPLYING RULE IN EXCESS TAKING IN EMINENT DOMAIN.

The numerous federal as well as state authorities in eminent domain may be classified and substantially harmonized into two groups:

1. Those cases relating to condemnations under particular enactments by Congress, such as the Second War Powers Act, in which *discretionary* power

is expressly delegated by the legislative branch of the Government to an executive officer or agency *to take whatever quantum of interest in lands the agency might choose.*

2. Those cases in which no such discretionary power is expressly delegated by Congress.

As the authorities which we have hereinabove discussed seem clearly to show, the discretionary power in question must be expressly delegated, and cannot be implied from any general wording of the statute.

At the beginning of the trial herein, the trial Court ruled as follows:

> "So I am ruling that the issue of the extent or necessity of the taking, if it is triable at all, is triable before the Court without the intervention of the jury, and *it is there limited to a question of whether the discretion vested by Congress in the administrative department has been abused or has been exercised with bad faith.*" (R. 63.)

In the above ruling, it appears that the trial Court overlooked the omission in the Lanham Act of any delegation whatever of discretionary power to the Housing Administrator as to the quantum of interests in private lands to be taken for temporary housing, and the trial Court assumed by such omission that Congress impliedly delegated the discretionary power. Consequently the judgment of the trial Court was predicated upon a non-existent "discretion vested by Congress".

The trial Court's conclusion (R. bottom of p. 49), apparently affirmed herein by the Court of Appeals, that the fundamental rules of law in eminent domain as followed in most state jurisdictions is not the same "with respect to condemnation by the federal government", relies upon the authority of the *Carmack* case (*Carmack v. U. S.*, 135 Fed. (2d) 196, 200). However, that case holds merely that the determination of "what is a public use and when there is a public necessity for taking specific property is in the first instance a legislative rather than a judicial question". We see no difference in the application of the rules of eminent domain, whether in state or federal jurisdictions, and we are unable to see how it supports the conclusion and judgment of the trial Court.

The due process clause of the Federal Constitution applies to the states as well as to federal agencies.

C.B. & Q.R. Co. v. Chicago, 166 U.S. 226;

City R. Co. v. Citizens Street R. Co., 166 U.S. 557.

Otherwise, if the rule in the *Carmack* case had been correctly applied, we believe that the trial Court would have made a different ruling; that the group of motions made by the defendants during the trial which were denied, would have been granted; that the uniformity of rules in eminent domain in Federal and State jurisdictions would have been recognized; and that the judgment would have been for the defendants accordingly.

(J) THE COMPLAINTS HEREIN FAIL TO ALLEGE A CAUSE OF ACTION IN CONDEMNATION.

Appellants included in their "Statement of Points" on appeal, the point (No. 6) "that the plaintiff has failed to allege a cause of action * * *" (R. 87.)

It seems clear that the specific finding by the President, stating compliance with the requirements in the Lanham Act, was a condition precedent essential to the statement of a cause of action, and is jurisdictional to the condemnation proceedings herein. No such allegation is found in the pleadings. No proof thereof is in the trial record.

The issue of compliance would not be presented and joined by the mere allegation in the complaints that the proceedings were filed "pursuant to the Lanham Act". *U. S. v. Certain Parcels of Land, etc.* (4th Circuit), 196 F. 2d 657 at 662, citing 18 *Am. Jur.* 961-962. The specific finding by the President as required in the Lanham Act is a prerequisite to condemnation. *Puerto Rico Ry. Light & Power Co. v. U. S.*, 131 F. 2d 491 at 495 (1st Circuit).

This failure to plead and failure to offer evidence at the trial, denying the defendants any opportunity to object to its adequacy, is apparently put aside by the brief conclusion of the Court of Appeals that

> "The required elements of a Declaration of Taking are set forth in Title 40 U.S.C.A. Sec. 258 (a), all of which have been met here."

It is not shown in the record how the Declarations of Taking can be deemed proof to provide the essential allegations and to state and support a cause of

action upon which findings of fact could be made and a judgment could be entered. The defendant landowners had no notice or opportunity to defend against such non-alleged issue, upon which the judgment must have been predicated erroneously.

The private property owners herein who suffered the loss of their lands had no opportunity to determine whether the Agency was acting within its authority as delegated by Congress, and not until the filing of briefs on appeal in the U. S. Court of Appeals was the declaration of the President or the contents thereof revealed to the landowners.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted, in both of the herein consolidated condemnation actions.

Dated, San Francisco, California,
January 7, 1953.

Respectfully submitted,

WILLIAM F. WHITE,
Attorney for Petitioners.

DONOVAN O. PETERS,
MARVIN HANDLER,
Of Counsel.

(Appendix Follows.)

Appendix

THE LANHAM ACT.

"Sec. 1521 (title 42) Federal Works Administrator's Powers Respecting Defense Housing.

"In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works 'Administrator' is authorized:

"(a) To acquire prior to the approval of title by the Attorney General (without regard to section 1339 of Title 10 and section 5 of Title 41), improved or unimproved lands or interests in lands by purchase, donation, exchange, lease (without regard to sections 40a and 34 of Title 40, or any time limit on the availability of funds for the payment of rent), or condemnation (including proceedings under sections 257, 258, 361-368, and 248a-258e of Title 40)."

"(etc.) * * *"

In Sec. 1531 of the Lanham Act, Congress indicated the temporary nature of the purpose intended:

"When the President shall have declared that the emergency declared by him on September 8, 1938, has ceased to exist* (a) the authority con-

*So declared by President July 25, 1947.

tained in sections 1521, 1532, 1561 and 1562 of this title shall terminate except with respect to contracts on projects previously entered into or undertaken and court proceedings then pending, and (b) property acquired or constructed under subchapters II-IV (including schools and hospitals) shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest. Oct. 14, 1940, C. 862, Title III, Sec. 4, 54 Stat. 1127, renumbered Sec. 301, and amended June 28, 1941, C. 260, Sec. 4(a), 53 Stat. 363; Apr. 10, 1942, C. 239, Sec. 1, 56 Stat. 212."

STATEMENT OF POINTS

(with designation of record on appeal).

1. That the Act of Congress commonly referred to as the Lanham Act, being the Act of October 14, 1940 (Public No. 849, 78th Congress), U.S.C.A. Title 42, Subchapter II, Sec. 1521 et seq., is the authorization by Congress under which the properties were sought to be taken in the herein condemnation proceedings.

2. That the plaintiff exceeded its authority as granted by Congress and exceeded its constitutional powers when it took or attempted to take the fee title absolute in the lands in the herein condemnation proceedings instead of a lesser quantum of interest therein such as a leasehold.

3. That the plaintiff, by taking the fee title of the properties herein, took an excessive quantum of interest in said properties, which excess is not for public use, need or necessity.

4. That the public use for which the Lanham Act authorized the acquisition of lands was limited to temporary housing and only a temporary use.

(a) That the purpose and intention of the Housing Administrator in the herein condemnation under the Lanham Act was temporary use and occupancy for temporary housing of wartime workers.

(b) That to the extent that the herein condemnation proceedings attempt to take any interest in defendant's lands beyond the necessities of temporary housing use is void.

(c) That any purported taking of fee title must be a qualified or terminable fee which terminates upon fulfillment of the temporary use and purpose for which the lands were taken.

(d) That the money deposited in Court to compensate defendants for the condemned interest in their lands taken under the Lanham Act can be used only to compensate for temporary use and occupancy and cannot be used to pay for any excess interest in lands taken or for any alleged liens of alleged bond holders.

5. That the taking of the fee title of the lands herein constitutes a taking for other than public use and for private use, without due process of law, and is void.

6. That the plaintiff has failed to allege a cause of action for the herein condemnations and for taking of fee title to lands herein for the use authorized by the Lanham Act or any other law, and has failed to allege necessity or authority for taking fee title in-

stead of a lesser quantum of interest in lands for uses and purposes authorized by Congress.

7. That the condemnor, in the complaints herein, relies upon the general declaration of the power of eminent domain stated in U.S.C.A. Title 40, Sections 257 and 258 (a to e). These sections confer no general authority to acquire land at will, but merely confer authority pursuant to the Constitution of the United States of America, to institute legal proceedings, and outline the procedure, for condemnation in eminent domain, "where its acquirement is otherwise authorized."

8. That the findings of fact, conclusions of law and judgment herein are without support of allegations in the complaint or pleadings herein, and are not supported by evidence or otherwise, and that the judgment is not supported by adequate findings of fact and conclusions of law.

9. That the burden of proof is on the plaintiff to prove necessity for taking the fee title to the lands of the defendants instead of a lesser quantum of interest therein, and has failed to prove its power and authorization for such taking of the fee title.

United States Court of Appeals
for the Ninth Circuit

MATTIE J. LEWIS, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13,[illegible]06
RICHMOND INVESTMENT COMPANY, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13,[illegible]97

Nov. 13, 1952

Appeals from the United States District Cou[illegible]t,
Northern District of California,
Southern Division

Before: STEPHENS, BONE, and POPE,
Circuit Judges

STEPHENS, Circuit Judge

In 1942 the United States, acting through the [illegible]ttorney General, sought to acquire by eminent dom[illegible]n the fee simple title to certain parcels of land ow[illegible]d by appellants herein. The owners of the several p[illegible]rcels, sought to be acquired, resisted the taking, a[illegible]d, in effect, posed the following problem:

> "Whether the Housing Administrator, [illegible]cting as an agency of the Government, was aut[illegible]rized

> by Congress under the Lanham Act (the Act of October 14, 1940 (Public No. 849, 76th Congress), [54 Stat. 1125], 42 U.S.C.A. Secs. 1521, et seq.), to condemn the fee simple title absolute instead of a lesser quantum of interest, such as a leasehold, for the temporary wartime housing as specified in said Lanham Act."[1]

The compensation for the taking was claimed to be neither just nor reasonable. The trial court held the authority for the taking ample, and ordered awards for the owners in the sums found by the juries as just compensation. The landowners appealed.

Congress, under the Lanham Act, has delegated wide authority to the Federal Works Administrator to condemn lands for use in carrying out the directives of the Act.[2] In Section 1(a) the Administrator

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[1]The quotation is from appellants' opening brief, at page 4, as the issue on appeal.

[2]54 Stat. 1125, as amended Jan. 21, 1942, 56 Stat. 11:

"Section 1. In order to provide housing for persons engaged in the national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the Administrator) is authorized:

"(a) To acquire prior to the approval of title by the Attorney General * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * *, or condemnation * * *.

"(b) By contract or otherwise * * * to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) * * * *Provided*, That the cost per permanent family dwelling unit shall not exceed an average of $3,750 for all types of construction for those units located within the continental

is given power to acquire land by "purchase * * * or condemnation." No distinction is made in the Act between what may be purchased and what may be condemned. And it now is well established that the government's power to condemn is coextensive with its power to purchase. *United States ex rel. T.V.A. v. Welch,* 1946, 327 U.S. 546, 554; *Polson Logging Co. v. United States,* 9 Cir., 1947, 160 F.2d 712, 714; 40 U.S.C.A. §257. Thus, if the Administrator might purchase the fee simple title in property for use under the provisions of the Lanham Act, he may also acquire the fee simple title by condemnation proceedings.

Appellants' arguments against the Administrator's power to acquire a fee simple title in land center upon the adjective "temporary" which they have read into the Lanham Act, and by which they have characterized the extent and scope of the Act. The Lanham Act confines the scope of the Administrator's authority with the word "temporary" only with reference to the type of units to be constructed "where the Administrator [in his discretion] shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency". This limitation does not pertain to the land on which the housing is situated. 42 U.S.C.A. §1521.

Appellants further argue that since the Act deals only with emergency defense housing which must be

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United States * * * *Provided further,* That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct temporary units. * * *"

"disposed of as promptly as may be advantageous under the circumstances and in the public interest"[3] after the national emergency declared by the President on September 8, 1939, ceases to exist, a leasehold would suffice, and that the condemnation of the fee simple is unnecessary, and consequently unauthorized. The Lanham Act does not limit the quantum of interest in property which may be taken for public use. Instead, subsection (a) declares, that the Administrator may acquire "lands or interests in lands", and subsection (b) declares that he may build permanent or temporary housing units on the "lands or interests in lands" acquired. The Administrator was thus given discretion to acquire either the entire fee, or a lesser interest in the land. Nor does the requirement that the acquired property be disposed of as quickly as possible after the emergency ceases preclude the acquisition of the entire fee. For "the Government, just as anyone else is not required to proceed oblivious to the elements of cost" in the exercise of its power of eminent domain. *United States ex rel. T.V.A. v. Welch,* 1946, 327 U.S. 546, 554. And, although the Lanham Act directs the Administrator to dispose of the property, he must do so only "as promptly as may be *advantageous* under the circumstances and *in the public interest.*" [Emphasis ours.] The Administrator was thus under a duty to consider and exercise his best discretion in the public interest

[3]Lanham Act, §4, 54 Stat. 1125, as amended June 28, 1941, 55 Stat. 363; 42 U.S.C.A. §1541.

in both acquiring and disposing of the property. See *Old Dominion Co. v. United States,* 1925, 269 U.S. 55.

Congress, by the Lanham Act, has empowered the Administrator at his discretion, to acquire the land needed for defense housing by condemnation, and to take the interest which in his opinion will be most advantageous to the government. There is no claim of bad faith in this case, and we cannot say that the evidence required a finding that the authorized officer abused his discretion in determining the amount and interest in land he decided to condemn. Therefore, his decision was final. *United States v. Meyer,* 7 Cir., 1940, 113 F.2d 387, 392; *Simmonds v. United States,* 9 Cir., 1952, ... F.2d .....

The California Code of Civil Procedure (Deering, 1949 ed.) §1239,[4] which appellants cite as authority for limiting to an easement the interest which the Administrator may acquire by eminent domain, is not applicable here. For even where the statutes upon which the condemnation is based require that the practice and procedure in condemation proceedings in

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[4] "§1239. [Estates and rights subject to be taken.] The following is a classification of the estates and rights in lands subject to be taken for public use:

"1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands.

"2. Except as provided in subsections 3 and 4, or specifically in any other statute, an easement, when taken for any other use; provided, * * *."

federal courts must be according to the "forms and methods of procedure afforded by the law of the State in which the court sits * * * [t]hey do not, and could not, affect questions of substantive right * * *." *United States v. Miller,* 1943, 317 U.S. 369, 380. Congress has the power and the right to condemn the fee title in lands for the public use under the power of eminent domain. Where, as in this case, Congress has authorized a public officer to condemn the fee title, a state's declaration of substantive law or policy to the contrary is not controlling. *United States v. Montana,* 9 Cir., 1943, 134 F.2d 194, 197. Moreover, whereas the proceedings discussed in the Miller case were predicated upon statutes wherein Congress required that state "practice, pleadings, forms and proceedings" be followed in the federal courts,[5] no such requirements are to be found in the Lanham Act.

Appellants further contend that since neither the Complaints in Condemnation nor the Declarations of Taking contain statements of finding by the President "that an acute shortage of housing exists or impends [in the Richmond, California, area] which would impede national-defense activities, and that such housing would not be provided by private capital when needed," (42 U.S.C.A. §1521), that the complaint fails to state a cause of action under the Lanham Act, and that therefore the district court had no jurisdiction to entertain the condemnation proceeding.

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[5]Act of August 1, 1888, 25 Stat. 357, c. 728, § 2; and Act of April 24, 1888, 25 Stat. 94, c. 194.

The required elements of a Declaration of Taking are set forth in Title 40 U.S.C.A. §258(a),[6] all of which have been met here.

While appellants claim here that the Administrator exceeded his authority, the claim was not raised in the trial court. Nevertheless, we have considered it here, and find against such claim.

Affirmed.

(Endorsed:) Opinion. Filed Nov. 13, 1952. Paul P. O'Brien, Clerk.

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[6] "* * * Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 545

MATTIE J. LEWIS, ET AL., AND RICHMOND INVESTMENT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion, but its reasons for rejecting petitioners' objections to the taking of lands are set forth at pages 47-51 of the record. The opinion of the court of appeals (R. 108-115) is reported in 200 F. 2d 183.

JURISDICTION

The judgments of the court of appeals were entered November 13, 1952 (R. 115-116). The

petition for a writ of certiorari was filed January 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the Lanham Act authorized the condemnation of a fee simple title to land on which housing was to be constructed under the terms of the Act, rather than a lesser title.

STATUTES INVOLVED

The relevant statutes are set forth in the Appendix.

STATEMENT

In October 1942, the United States instituted proceedings to condemn the fee simple title to certain lands in the City of Richmond, County of Contra Costa, State of California, for use in connection with defense housing. Two complaints in condemnation were filed, one comprising 9.68 acres and the other 54.573 acres, together with improvements thereon and excepting such portions of the property as were reserved for street purposes and certain public easements (R. 4-11, 20-30). Declarations of taking were filed and estimated just compensation was deposited in the registry of the court (R. 12-13, 30-32). Judgments were entered vesting in the United States the full fee simple title to the lands condemned, and ordering immediate delivery of possession (R. 13-16, 32-35). The landowners contended by answer (R. 36-39) and motions (R. 39-40, 42-47) that the quantum of interest in the lands condemned, a fee simple title, is ex-

cessive for use authorized by the Lanham Act, ice the housing project was a temporary one. he motions were denied (R. 41, 47-51). Just m- pensation was determined by a jury and final jg- ments were entered (R. 52-58).

The court of appeals affirmed the judgn its, holding that the Lanham Act does not limi the quantum of interest in property which ma be taken for public use, that the Act gives the d- ministrator discretion to acquire the land n led for defense housing by condemnation, and to ake the interest which in his opinion will be mo ad- vantageous to the Government (R. 108-115).

ARGUMENT

The decision of the court of appeals is c ect and does not conflict with any applicable decis n of a federal court. The decisions have uniformh eld that the United States has authority to acqui the absolute title to property which is to be u l to promote war purposes, even though such pl ical use would end shortly after termination of th var. *United States* v. *State of New York*, 160 F. 479 (C.A. 2), certiorari denied, 331 U.S. 832, reh ring denied, 331 U.S. 869; *United States* v. *Kans ity, Kan.*, 159 F. 2d 125 (C.A. 10); *United St s* v. *6.74 Acres of Land, etc.*, 148 F. 2d 618 (C 5). The argument urged here is substantially th ame as that unsuccessfully presented by the pet ner in the *State of New York* case, *supra*. Petit ers' assertion that "Questions involving the * *

quantum of interests in lands" taken are judicial questions (Pet. 24-26) is contrary to the rule applicable to condemnation by the Federal Government.[1] *Shoemaker* v. *United States,* 147 U.S. 282, 298; *Sears* v. *Akron,* 246 U.S. 242, 251; *United States* v. *Gettysburg Electric Ry.,* 160 U.S. 668, 685; *United States* v. *Meyer,* 113 F. 2d 387 (C.A. 7), certiorari denied, 311 U.S. 706. See also *United States* v. *Carmack,* 329 U.S. 230, 247. None of the cases relied upon by petitioners lead to a different conclusion.

In this case, the Administrator was clearly empowered to acquire either fee title or some lesser interest in the property which in his judgment would best serve the governmental purpose. Congress, in the Lanham Act, authorized the Administrator "to acquire * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation." The statute incorporates, by reference, 40 U.S.C. 257, authorizing condemnation whenever an officer is "authorized to procure real estate." Cf. *U. S. ex rel. T. V. A.* v. *Welch,* 327 U. S. 546. Moreover, the Act provides (42 U. S. C. 1521(b)) for the

[1] In this connection, it should be noted that the quotation on page 24 of the petition for certiorari, which purports to be from this Court's opinion in *U. S. ex rel. T.V.A.* v. *Welch,* 327 U.S. 546, is actually taken from the opinion of the Court of Appeals for the Fourth Circuit (150 F. 2d 613, 616) which this Court reversed. The same is true of the first and second full paragraphs on page 26 of the petition, which purports to be from Mr. Justice Reed's concurring opinion; the third paragraph on page 26 is from *School Board* v. *Alexander,* 126 Va. 407, 413, 101 S.E. 349, 351, rather than from the opinion of Mr. Justice Reed.

construction of either permanent or temporary[2] structures "on lands or interests in lands acquired under the provisions of subsection (a) hereof" (*United States* v. *City of Philadelphia,* 56 F. Supp. 862, 864-865 (E. D. Pa.), affirmed per curiam, 147 F. 2d 291 (C. A. 3), certiorari denied, 325 U. S. 870). The Act also provides for the transfer to the jurisdiction of the Army or Navy Departments of such housing constructed under the provisions of the act "as may be considered to be permanently useful" to such department; for the sale and disposition of housing as expeditiously as possible; and for "sale" of Lanham Act houses "on an individual basis", with special provision for the price to veterans (42 U. S. C. (Supp. V) 1524). (See *Gibbs* v. *United States,* 150 F. 2d 504 (C. A. 4), certiorari denied, 326 U. S. 771; *Seiden* v. *Larson,* 188 F. 2d 661, 663 n. (C. A. D. C.), certiorari denied, 341 U. S. 950.) With these various provisions and purposes indicating that the Administrator can convey a permanent title, it is perfectly clear that, contrary to the petitioners' contention (Pet. pp. 13-23),[3] the Administrator had broad discretion to determine whether to acquire

[2] Section 1521(b) authorizes the construction of buildings, and provides "that the cost per *permanent* family-dwelling unit shall not exceed an average of $3,750 for all types of construction * * * *Provided further,* That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct *temporary* units:" [italicis supplied]

[3] The opinion of the court of appeals does not reverse its holding in *Warm Springs Irr. Dist.* v. *Pacific Live Stock Co.,* 270 Fed. 560 (C.A. 9) since that case involved condemnation under authority of the State of Oregon (Pet. 19).

fee title or whether some lesser interest would satisfy the needs of the United States. As the court of appeals pointed out (R. 111-112), the mere fact that the particular housing was intended to be temporary did not preclude the Administrator from concluding that a fee title was desirable.

Petitioners' argument that the Administrator under the Lanham Act did not have discretion to determine what interest in lands should be condemned is largely premised on the erroneous notion that the authority to condemn is much more limited than the authority to purchase for the same purpose (Pet. 9, 11-12, 15-16). However, petitioners are forced to admit that the Lanham Act itself makes no such distinction (Pet. 12), and the holding of the court of appeals (R. 110) that "* * * it now is well established that the government's power to condemn is coextensive with its power to purchase," is sustained by decisions of this and other courts. *U. S. ex rel. T. V. A.* v. *Welch*, 327 U. S. 546; *Hanson Co.* v. *United States*, 261 U. S. 581, 587; *Polson Logging Co.* v. *United States*, 160 F. 2d 712 (C. A. 9).

Petitioners' contention (Pet. 29-30) that the Government failed to allege a cause of action because the petition in condemnation failed to state a specific finding by the President [4] in compliance with the requirements of the Lanham Act, comes

[4] The fact is that such a specific finding of the existence of a housing shortage in Richmond, California, was made on June 3, 1942. The Public Housing Administration so advised us by letter of March 24, 1952.

too late, and was waived when they did not present it by motion or answer, but urged it for the first time upon appeal. *United States* v. *Carey,* 143 F. 2d 445 (C. A. 9); *United States* v. *Nudelman,* 104 F. 2d 549 (C. A. 7), certiorari denied, 308 U. S. 589; *Forbes* v. *United States,* 268 Fed. 273 (C. A. 5).[5] The court's ruling in this regard (R. 114) is correct. Since it was clear that the proceedings were being instituted under the Lanham Act[5] (R. 3-11, 12-13, 17-29, 30-32), there is nothing to support petitioners' assertion that they had no opportunity to raise this question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY, 1953.

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[5] In *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F. 2d 491 (C.A. 1) relied upon by petitioners (Pet. 29), the court stated (p. 496): "Since this defect is one which might be cured upon remand by a further amendment of the petition for condemnation, or by the filing of a new petition, we do not rest our decision on this ground alone."

APPENDIX

STATUTES INVOLVED

The Lanham Act of October 14, 1940, 54 Stat. 1125, as amended, provides as follows:

42 U.S.C. 1521.

In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator [6] (hereinafter referred to as the "Administrator") is authorized:

(a) To acquire prior to the approval of title by the Attorney General * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease, * * * or condemnation (including proceedings under [the Acts of August 1, 1888 (25 Stat. 357), March 1, 1929 (45 Stat. 1415, and February 26, 1931 (46 Stat. 1421),] sections 257, 258, 301-368, and 258a-258e of Title 40).

(b) By contract or otherwise * * * prior

[6] By Executive Order 9070, the functions, powers and duties of the Federal Works Administrator were consolidated with those of other housing agencies of the Government and transferred to the National Housing Agency. By Executive Order 9150, the Federal Public Housing Commissioner of the National Housing Agency was authorized to acquire and dispose of property.

to the approval of title by the Attorney General to make surveys and investigations plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available, * * * *Provided,* That the cost per permanent family-dwelling unit shall not exceed an average of $3,750 for all types of construction * * * *Provided further,* That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct temporary units: * * *

42 U.S.C. (Supp. V) 1524.

It is declared to be the policy of this subchapter to further the national defense by providing housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible: *Provided,* That in disposing of said housing consideration shall be given to its full market value and said housing or any part thereof shall not, unless specifically authorized by Congress, be conveyed to any public or private agency organized for slum clearance or to provide subsidized housing for persons of low income: *Provided further,* That the Administrator may, in his discretion, upon the

request of the Secretaries of the Army or Navy transfer to the jurisdiction of the Departments of the Army or Navy Department such housing constructed under the provisions of subchapters II-IV of this chapter as may be considered to be permanently useful to the Army or Navy: *Provided further,* That whenever the Administrator disposes of any permanent house or structure containing not more than four family dwellings units under authority of this subchapter by offering such house or structure for sale on an individual basis, he shall, when the purchaser is a veteran buying for his own occupancy, sell any such house or structure (1) at a purchase price not in excess of the apportioned cost of such house or structure and of the land and appurtenances allocated thereto, together with the apportioned share of the cost of all utilities and other facilities provided for and common to the project of which such house or structure is a part, or (2) at a purchase price not in excess of such considered full market value of such house or structure and the land, appurtenances, utilities and facilities allocated thereto, whichever purchase price is the less: *Provided further,* That, for the purposes of this section, housing constructed or acquired under the provisions of Public Law 781, Seventy-sixth Congress, approved September 9, 1940, or Public Law 9, 73, or 353, Seventy-seventh Congress, approved, respectively, March 1, 1941, May 24, 1941, and December 17, 1941, shall be deemed

to be housing constructed or acquired under this chapter.

The Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257, provides as follows:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so.
> * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 241038 1132

In the Supreme Court
OF THE
United States

Office - Supreme Court, U.S.
FILED
MAR 6 1953
HAROLD B. WILLEY, Clerk

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vs.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY TO OPPOSITION BRIEF HEREIN.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PETITIONERS' REPLY TO OPPOSITION BRIEF HEREIN.

The brief filed herein by the Solicitor General serves to focus attention on the basic weakness of the Housing Administrator's position in taking, by the

arbitrary method of condemnation, an excessive absolute fee title for merely an authorized temporary housing use.

Whether the *United States Government* has the power to condemn seems to be set up as a diversionary argument. Instead, our question is *the extent* that Congress delegated the extraordinary power of condemnation to an agency when it enacted the Lanham Act.

We are apparently in accord that the United States Government has the general power to condemn fee title for a public purpose, but despite the Solicitor General's argument in his brief it seems obvious that he has completely missed the point which is herein submitted for review.

To pin point the argument we specifically challenge the Solicitor General's statement on page 4 of his brief as follows:

> "In this case, the *Administrator* was clearly empowered to acquire either fee title or some lesser interest in the property which *in his judgment* would best serve the governmental purpose." (Our emphasis.)

The Lanham Act, by which Congress delegated the power "to acquire" to the Administrator, grants no such discretionary power for him to act "in his judgment". Where is such discretionary power granted in the Lanham Act? Is it to be implied? If it is assumed to be an implied power or inherent power of an agency, we respectfully urge that the resulting rule

will be in conflict with sound rulings heretofore established by this Court.

We can only refer to our petition and brief herein for a careful presentation of undisputed facts, and undisputed rules in eminent domain, which the Solicitor General chooses to ignore.

On page 6 of his brief he states:

> "As the Court of Appeals pointed out (R. 111-112), the mere fact that the particular housing was intended to be temporary did not preclude the Administrator from concluding that a fee title was desirable."

The Solicitor General admits that the Administrator condemned for the express purpose of *temporary* housing, but persists in his unsupported argument that the Administrator was authorized by Congress to exercise his "judgment" in taking an excess quantum of interest in lands beyond the needs of his *temporary* use.

Exactly as the decision in *U. S. v. Welch,* 327 U.S. 546 was predicated upon the particular statutory authorization by Congress, it seems our present consideration of the Housing Administrator's powers should be focused upon the Lanham Act and its construction pursuant to the Constitutional provisions and rules in eminent domain heretofore well established in this Court.

CONCLUSION.

A review pursuant to the petition herein should be granted.

Dated, San Francisco, California,
March 2, 1953.

Respectfully submitted,
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